Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Appellants,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DEFER ACTION AND REPLY TO MOTION TO DISMISS

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On June 14, 1977, Appellants filed with the Public Utilities Commission a petition to hold further hearings with a view to modifying the three decisions setting a division of revenues between overlying and underlying carriers. A Commission Administrative Law Judge granted the petition and set hearings pursuant to Section

1708 of the Public Utilities Code.* This action evidently motivated the Commission to file its Motion to Dismiss this appeal. The Motion is at best premature and should be denied.

Nevertheless, the Commission's apparent willingness to reconsider its three challenged decisions in a separate proceeding is reason for this Court to defer taking action in this matter until the Commission has had an opportunity to issue a new decision.

I.

THE FINALITY OF THE CALIFORNIA SUPREME COURT'S ACTION WAS NOT AFFECTED BY APPELLEE'S RECENT DECISION TO HOLD FURTHER HEARINGS

Appellee is mistaken in its assertion that its decision to hold further hearings on setting a division of revenues has affected the finality of the decree of the California Supreme Court denying a writ of review, which is the judgment appealed in this case. The denial of the writ, and the subsequent denial of rehearing, was "the final word of a final court." *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770 (1945).

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*Public Utilities Code §1708: "The Commission may at any time upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

II.

THE FINALITY OF THE APPELLEE'S DECISIONS WAS NOT CHANGED BY ITS DETERMINATION TO HOLD FURTHER HEARINGS

The decisions appealed from remain final until such time as the Commission, after providing the parties an opportunity to be heard, rescinds, alters or amends them. P.U. Code §1708; *Northern Cal. Ass'n v. Public Utilities Commission,* 61 Cal.2d 126, 37 Cal.Rptr. 432, 390 P.2d 200 (1964).

If the Commission were correct that this Court has no jurisdiction to review the three orders in question because the Commission may rescind, alter or amend them pursuant to Section 1708 of the Public Utilities Code, it is difficult to see how this Court would ever have jurisdiction because the Commission may "at any time" rescind, alter or amend its orders. This Court has on many occasions heard appeals from orders of the California Commission.

III.

THIS COURT SHOULD DEFER ACTION UNTIL THE PUBLIC UTILITIES COMMISSION HAS ISSUED A NEW DECISION

The cases cited by Appellee in Part I of its Motion to Dismiss stand for the proposition that this Court will not decide cases unless the disputed issues are plainly presented for resolution and such resolution is necessary. When this appeal was filed, these two requirements were met. Now, however, the granting of Appellants' petition for further hearings *may* make it unnecessary for this Court to decide the case.

The Court should not dismiss the appeal as premature, as it did in *Boston & Maine R. Co. v. United States,* 358 U.S. 68, 3 L.Ed.2d 34, 79 S.Ct. 107 (1959), but should merely postpone making a decision on jurisdiction until after the Commission has acted. In *Boston & Maine,* the District Court set aside the order of the Interstate Commerce Commission and remanded the case for further consideration. In the present case there has been no remand and the Commission's three orders are still valid and could be put into effect. If a new decision from the Commission merely reaffirms the three earlier decisions, it would be unfair to require Appellants to start the long and expensive appeals process all over again.

IV.

IF THIS COURT DENIES THE MOTION TO DEFER ACTION THE DECISIONS OF THE PUBLIC UTILITIES COMMISSION SHOULD BE VACATED

By bringing this appeal Appellants seek to have the three decisions of the Public Utilities Commission vacated and additional hearings held so that Appellants may be afforded procedural due process. By setting further hearings, the Commission will now have an opportunity to reach an equitable decision based on the evidence.

The validity of the three decisions in question nevertheless remains in dispute. The Commission has not conceded that Appellants were denied procedural due process, although in its Motion to Dismiss it does not even attempt to justify the decisions, and the Commission could, if it wanted, put those decisions into effect.

In order that Appellants may be protected from the adverse economic impact of having an inequitable division of revenues put into effect, Appellants pray that this Court, if it declines to defer action, take jurisdiction of the appeal and order that the three decisions of the California Public Utilities Commission be vacated.

V.

APPELLANTS HAVE STANDING TO QUESTION THE CONSTITUTIONALITY OF THE DISTINCTION BETWEEN PUBLIC AND NONPUBLIC WORKS CONSTRUCTION

Appellee misunderstands the force of Appellants' argument concerning the distinction between public and nonpublic works construction projects. Far from asserting that public works construction projects should have been included in the 80%-20% division of revenues, Appellants urge that the Commission's finding, that no division is equitable with respect to public works construction, should have applied equally to nonpublic works construction because no rational distinction, or at any rate no distinction supported by evidence in the record, can be drawn between the two types of projects. Members of the Overlying Carrier Chapters are engaged in transportation on nonpublic works construction projects and would be economically hurt by the Commission's failure to exempt such transportation from the division of revenues if such decisions were to go into effect. Appellants, therefore, have standing.

VI.

CONCLUSION

For the reasons stated above, Appellants pray that this Court postpone a decision on whether or not to take jurisdiction of this appeal until the Commission issues a new decision because only then can it be determined whether the Commission's action will or will not make this appeal moot.

Alternatively, the Court should order that the three orders of the Public Utilities Commission complained of be vacated and that Appellants be awarded all taxable costs of suit pursuant to Rule 57 of the Rules of the Supreme Court.

Respectfully submitted,

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Date: September 12, 1977